**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **LANCE SIMMONS** | **:** | **CIVIL ACTION** |
| vs. | : | |
| DOLORES POLTRONE; JOHN IZZI; RON SMITH; OFFICER CLIFFORD DOWNWARD, II; and OFFICER MICHAEL HEIDELBAUGH | : | No. 96-8659 |

**MEMORANDUM AND ORDER**

AND NOW, to wit, this 17th day of December, 1997, upon consideration of defendant John Izzi's Motion for Summary Judgment, filed May 29, 1997, Document No. 19, and Plaintiff's Answer to Motion for Summary Judgment of John Izzi, filed June 18, 1997, Document No. 23, **IT IS ORDERED** that defendant John Izzi's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**, as follows:[1]

Defendant John Izzi's Motion for Summary Judgment is **GRANTED** as to Counts IV, V, XII, XIII, and IX.

Defendant John Izzi's Motion for Summary Judgment is **DENIED** as to Counts VI and VII.

The decision of the Court on defendant John Izzi's Motion for Summary Judgment is based on the following:

**Background**: The facts of this case revolve around the alleged theft of items from Dolores Poltrone's home in West Chester, Pennsylvania. It all began when Dolores Poltrone agreed to rent plaintiff an apartment in part of her home. At some point after plaintiff and his wife had settled into the apartment, a large storm struck eastern

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[1] Although not raised by any party, the Court notes that the only claims brought against John Izzi, a non-diverse party, are state law claims. The Court nonetheless has jurisdiction over this matter because removal under 28 U.S.C. § 1441 was premised on the existence of a federal question and a court may exercise pendent party jurisdiction where its original jurisdiction is based on a federal question. See 28 U.S.C. § 1367(a); see also 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, § 3567.2, 44 (1997 Supp.) ("The principal purpose of [28 U.S.C. § 1367] is to make it clear that in federal-question cases pendent-party jurisdiction is permissible.").

Pennsylvania, causing significant damage to Ms. Poltrone's property. According to plaintiff's Complaint, Ms. Poltrone was aware that plaintiff was a landscaper; with this knowledge in hand, it is alleged that she hired him to remove trees that had been blown down and otherwise to fix up her storm-tossed property. After plaintiff completed the work he submitted a bill. It was, he claims, never paid. In response to Ms Poltrone's failure to pay his bill, plaintiff began withholding rent. Ms Poltrone allegedly became angry and, as a result, entered into a conspiracy against plaintiff with John Izzi – Ms Poltrone's boyfriend – and the other defendants.

The plan, says plaintiff, was to falsely accuse him of having stolen various expensive consumer electronics items that had been kept in a locked room on Ms. Poltrone's property. Ron Smith, one of the alleged co-conspirators, set things in motion when he told defendant, Officer Downward, another of the alleged co-conspirators, that he was approached by plaintiff who had offered to sell him a VCR. John Izzi and Dolores Poltrone also gave statements to Officer Downward who recorded them in an incident report. Based on information provided by Ron Smith, Dolores Poltrone and John Izzi, an arrest warrant was sworn out for plaintiff by a Detective Euler; when plaintiff and his wife appeared at the police station to find out what was going on, plaintiff claims that he was violently arrested. Officers Downward and Heidelbaugh (another defendant and alleged participant in the scheme) allegedly tackled plaintiff and sprayed a noxious chemical in his face (either mace or pepper spray).

Plaintiff was charged with burglary, but all charges were dropped at a preliminary hearing held on January 23, 1995, when John Izzi failed to appear and Ron Smith not only refused to testify to what he had told Officer Downward, but said he had been offered $1,000 by defendant John Izzi "to burn" plaintiff. This statement was recorded by Detective Euler.

Plaintiff started suit by a Writ of Summons in the Court of Common Pleas of Delaware County on October 15, 1996; his Complaint was filed on December 9, 1996.

The action was removed to this Court on December 27, 1996.

Plaintiff's Complaint contains twelve counts, seven of which name John Izzi. Those are: (1) Count IV, alleging state law defamation against John Izzi and Dolores Poltrone; (2) Count V, alleging state law conspiracy to defame against John Izzi, Dolores Poltrone, Ron Smith and Officer Downward; (3) Count VI, alleging state law malicious prosecution against John Izzi, Ron Smith and Officer Downward; (4) Count VII, alleging state law conspiracy to maliciously prosecute against John Izzi, Dolores Poltrone, Ron Smith and Officer Downward; (5) Count IX, alleging state law conspiracy to "false arrest/false imprisonment" against John Izzi, Dolores Poltrone, Ron Smith, Officer Downward, Officer Heidelbaugh, and Officer Capik[2]; (6) Count XII, alleging state law intentional infliction of emotional distress against John Izzi, Dolores Poltrone, Ron Smith and Officer Downward; and (7) Count XIII, alleging state law conspiracy to intentionally inflict emotional distress against John Izzi, Dolores Poltrone, Ron Smith and Officer Downward.

**Standard for Summary Judgment**: In deciding a motion for summary judgment the Court must determine whether there exist any triable issues of fact. Anderson v. Liberty Lobby, 477 U.S. 242, 247-49 (1986). In responding to a motion for summary judgment, the non-moving party must present "more than a mere scintilla of evidence in its favor" and may not rely on unsupported assertions or conclusory allegations. Williams v. Borough of Westchester, 891 F.2d 458, 460 (3d Cir. 1989) (citation omitted). Nonetheless, "[w]hen considering a motion for summary judgment, the court must view all evidence in favor of the non-moving party. . . . Additionally, all doubts must be resolved in favor of the non-moving party." Securities and Exchange Commission v. Hughes Capital Corp., 124 F.3d 449, 452 (3d Cir. 1997) (citations omitted). Applying that standard, the Court will next address each of the claims against John Izzi.

**Count IV**: Defendant John Izzi's Motion for Summary Judgment as to Count IV of

[2] By Order dated March 4, 1997 all claims against defendant Officer Capik were dismissed with prejudice.

plaintiff's Complaint, alleging that defendant Izzi defamed plaintiff, is granted because the claim is barred by the Pennsylvania statute of limitations. See 42 Pa.S.C.A. § 5523(1) (West Supp. 1997) ("The following actions must be commenced within one year: (1) An action for libel, slander or invasion of privacy."). Defendant Izzi argues that the statute of limitations begins to run from the moment of publication. Pennsylvania, however, employs a "discovery rule" in defamation actions: the statute of limitations does not, therefore, begin to run until "the plaintiff has discovered his injury or, in the exercise of reasonable diligence, should have discovered his injury." DiNicola v. DiPaolo, 945 F.Supp. 848, 861 (W.D. Pa. 1996) (citation omitted). Although mindful that doubts must be resolved in favor of the non-moving party, the Court concludes that no genuine issue of material fact exists as to whether the allegations of defamation are barred by the statute of limitations.

In his Complaint, plaintiff alleges that publication of the defamatory matter occurred on October 26, 1994. Even assuming that plaintiff was not immediately aware of these statements, the latest he should have discovered, in the exercise of reasonable diligence, that he had been slandered by John Izzi was at the time of the preliminary hearing. That hearing, on charges of burglary, was held before District Justice Rita Arnold in Chester County on January 23, 1995 and by that time plaintiff was aware that he had been charged with crimes. He should also have been aware that John Izzi was a source of those charges because a report was filed by John Izzi with the police on October 26, 1994 and that report served as the basis for an affidavit, sworn by Detective Euler on November 9, 1994, used to secure a warrant issued for plaintiff's arrest. Both the report and affidavit were available to plaintiff while preparing for his preliminary hearing and he therefore should have, in the reasonable exercise of diligence, discovered the defamation, at the latest, by the time of the preliminary hearing.

This suit was commenced by Writ of Summons issued on October 15, 1996 whereas the preliminary hearing was held on January 23, 1995. Thus, plaintiff allowed

more than one year to pass after the preliminary hearing – the latest occasion on which he knew, or, with the exercise of reasonable diligence, should have known, of the facts underlying his defamation claim before starting suit; the statute of limitations had run. Plaintiff makes no argument on this point in his Answer to the Motion, nor does he allege when he first discovered defendant Izzi's participation. There is also no evidence in the record submitted by parties of any defamatory statements by Izzi or anyone else after January 23, 1995. For these reasons, the Court concludes that this claim is time barred; defendant Izzi's Motion for Summary Judgment is granted as to Count IV.

4. **Count V**: Defendant John Izzi's Motion for Summary Judgment as to Count V of plaintiff's Complaint, alleging, *inter alia*, that defendant John Izzi conspired to defame plaintiff, is granted because the claim is barred by Pennsylvania's statute of limitation.[3] See 42 Pa.S.C.A. § 5523(1) (West Supp. 1997). The statute of limitations for a conspiracy is the same as that for the substantive claims underlying the conspiracy. See Kingston Coal Co. v. Felton Mining Co., Inc., 690 A.2d 284, 287 n.1 (Pa. Super. Ct. 1997); Chappelle v. Chase, 487 F.Supp. 843, 846 (E.D. Pa. 1980) (holding that conspiracy to defame was governed by one year statute of limitation). In the case of a civil conspiracy, the statute of limitation is measured from each overt act. See, e.g., Kost v. Kozakiwicz, 1 F.3d 176, 190 (3d Cir. 1990). Plaintiff makes no allegation of any overt act in furtherance of the alleged conspiracy within one year prior to October 15, 1996, the date this suit was instituted, nor does an examination of the record reveal any such act. Therefore, the Court concludes that this claim is time barred as well and grants defendant Izzi's Motion for Summary Judgment on Count V.

5. **Counts XII**: Defendant John Izzi's Motion for Summary Judgment is granted with respect to Count XII of the Complaint in which plaintiff asserts a claim of

[3] Count V alleges that defendants Dolores Poltrone, Ron Smith and Officer Downward also participated in the conspiracy to defame.

intentional infliction of emotional distress.[4] In discussing that tort, Pennsylvania cases have cited the Restatement (Second) of Torts § 46 with approval. See, e.g., Motheral v. Burkhart, 583 A.2d 1180, 1188 (Pa.Super. 1990). A person commits the tort of intentional infliction of emotional distress when, through "extreme and outrageous conduct [he] intentionally or recklessly causes severe emotional distress to another . . . ." Restatement (Second) of Torts § 46. The comments to the Restatement further define extreme and outrageous conduct:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Restatement (Second) of Torts § 46, comment d.

Initially, it is for the Court to determine whether a plaintiff's allegations and evidence rise to this level of outrageousness but, "where reasonable persons may differ, it is for the jury to determine whether the conduct is sufficiently extreme and outrageous so as to result in liability." Motheral, 583 A.2d at 1188 (citations omitted). In cases presenting facts somewhat similar to the case at bar, courts have dismissed claims for intentional infliction of emotional distress. See, e.g., Motheral v. Burkhart, 583 A.2d 1180 (Pa.Super 1990) (holding that claim of intentional infliction of emotional distress

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[4] The Court notes that there is some dispute among Pennsylvania's appellate courts as to whether there is a cause of action for intentional infliction of emotional distress. Compare Ford v. Isdaner, 542 A.2d 137 appeal denied, 554 A.2d 509 (Pa. 1988) (holding that no such tort exists in Pennsylvania) with Johnson v. Caparelli, 625 A.2d 668 (1993) (citing to cases recognizing the tort); see also Kazatsky v. King David Memorial Park, Inc., 527 A.2d 988, 989 (Pa. 1987) (addressing a claim for intentional infliction of emotional distress but, because no claim was stated, leaving "to another day the question of the viability of section 46" of the Restatement (Second) of Torts). However, the Third Circuit has addressed this question and has predicted that Pennsylvania will recognize such a tort. See, e.g., Silver v. Mendel, 894 F.2d 598, 606 (3d Cir.), cert. denied, 496 U.S. 926 (1990); see also Mansman v. Tuman, 970 F.Supp. 389, 402 (E.D. Pa. 1997). The Court is bound by Third Circuit precedent and will, therefore, recognize the tort.

would not lie where defendant allegedly lied to police and by doing so had plaintiff arrested and detained); Mastromatteo v. Simock, 866 F.Supp. 853, 859 (E.D. Pa. 1994) (holding that allegations that a police officer manufactured facts to support probable cause for an arrest warrant resulting in detention of plaintiff did not state a claim for intentional infliction of emotional distress); Denenberg v. American Family Corp. of Columbus, 566 F.Supp. 1242 (E.D. Pa. 1983) (finding claim was not stated where defendant allegedly falsely instituted civil lawsuits against plaintiff); but see Gilbert v. Feld, 788 F.Supp. 854, 857 (E.D. Pa. 1992) (Pollak, J.) (holding, without discussion, that claim had been stated where defendants were alleged to have "procured the institution of criminal charges against [plaintiff] by providing false and misleading information to and by concealing information from" the district attorney's office).

Defendant Izzi argues that plaintiff has not demonstrated that the alleged conduct is so extreme and outrageous as to rise to the level of an intentional infliction of emotional distress. The Court must reluctantly agree. The behavior alleged, if true, is deplorable, but it is not so extreme and outrageous that it rises to an intentional infliction of emotional distress. Moreover, recovery under this tort is limited to those cases in which a defendant's actions create severe emotional distress. "The Pennsylvania Supreme Court has enunciated an objective standard, permitting recovery only 'where a reasonable person normally constituted would be unable to adequately cope with the mental stress engendered by the circumstances of the event.'" Mastromatteo, 866 F.Supp at 859 (E.D. Pa. 1994) (quoting Kazatsky v. King David Memorial Park, 527 A.2d 988, 993 (Pa. 1987)). To make out a claim, there must be objective proof supported by competent medical evidence that the plaintiff actually suffered the claimed distress. Kazatsky, 527 A.2d at 995. Although plaintiff generally alleged that he has suffered "great . . . emotional distress," Plaintiff's Complaint ¶ 65, he has not otherwise presented any evidence of the degree or severity of that distress, nor has he offered any medical evidence. Plaintiff may not rest on conclusory allegations when defending against a

motion for summary judgment. See Williams, 891 F.2d at 460. Thus, the Court grants defendant Izzi's Motion for Summary Judgment as to Count XII.

**Count XIII**: Defendant John Izzi's Motion for Summary Judgment is also granted with respect to plaintiff's claims of conspiracy to intentionally inflict emotional distress. Under Pennsylvania law, a cause of action for civil conspiracy only exists if there is a cause of action for the underlying act. See Samuel v. Clark, 1996 WL 448229, *4 (E.D. Pa. 1996) (citing Pelagatti v. Cohen, 536 A.2d 1337, 1341-42 (Pa. Super. Ct. 1987), appeal denied 548 A.2d 256 (Pa. 1988); see also Gordon v. Lancaster Osteopathic Hospital Assoc., Inc., 489 A.2d 1364, 1371 (Pa. Super. Ct. 1985) (holding that where there was no basis for defamation there could be no action for conspiracy to defame); Rose v. Winninger, 439 A.2d 1193, 1198 (Pa. Super. Ct. 1982) (same). Because the Court has concluded that there is no genuine issue of material fact with respect to the underlying claim of intentional infliction of emotional distress and has therefore granted summary judgment to defendant Izzi on that claim, it does the same with respect to Count XIII: defendant Izzi's Motion for Summary Judgment as to Count XIII is granted.

**Count VI**: Defendant John Izzi's Motion is denied with respect to Count VI, alleging malicious prosecution. Although defendant Izzi makes no argument as to plaintiff's claim for malicious prosecution, beyond seeking summary judgment as to that count, the Court will nonetheless examine the basis of that claim.

"A cause of action for malicious prosecution has three elements. The defendant must have instituted proceedings against the plaintiff 1) without probable cause, 2) with malice, and 3) the proceedings must have terminated in favor of the plaintiff. . . . Malice may be inferred from the absence of probable cause." Kelley v. General Teamsters, Chauffeurs, and Helpers, Local Union 249, 544 A.2d 940, 941 (Pa. 1988) (citation omitted). The existence of Officer Downward's incident report and Detective Euler's supplemental report are enough to establish a genuine issue of material fact as to a claim for malicious prosecution.

In his report, Officer Downward records that he was told by defendant Ron Smith that plaintiff approached Smith offering to sell a VCR. Some time later, Detective Euler reported that defendant Smith would not testify to those facts and that Smith also said that he had been offered $1,000 by defendant Izzi to "burn" plaintiff. From this evidence, a jury could choose to believe that defendant Izzi acted to have plaintiff arrested and prosecuted. That would be sufficient to demonstrate both a lack of probable cause and malice. That the charges were dropped by the Commonwealth for lack of evidence establishes that "proceedings terminated in favor of the plaintiff." Because there is a genuine issue of material fact, the Motion for Summary Judgment as to Count VI is denied.

**Count VII**: Defendant John Izzi's Motion for Summary Judgment is also denied with respect to Count VII, which alleges a conspiracy to maliciously prosecute. Under Pennsylvania law, the elements of a cause of action for civil conspiracy are: "(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage." Smith v. Wagner, 588 A.2d 1308, 1311-12 (Pa. Super. Ct. 1991). This agreement may be proved, of necessity, through circumstantial evidence. See see Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 212 n. 9, 412 A.2d 466, 473 n. 9 (1979) ("[A] conspiracy must ordinarily be proved by circumstantial evidence . . . ."). "Circumstantial evidence establishes a conspiracy if it logically leads to the conclusion that one exists. However, if the evidence only allows the jury to base a finding on conjecture or speculation, then the circumstantial evidence is insufficient to establish a conspiracy." Urbanic v. Rosenfeld, 616 A.2d 46, 54 (Pa. Commw. Ct. 1992).

Defendant Izzi argues that plaintiff has failed to come forward with affirmative evidence of a conspiracy. The record shows, however, that Officer Downward recorded Ron Smith's statement in his report and that Smith said he was approached by the

plaintiff offering to sell him a VCR and also that Smith had heard that the plaintiff had gotten the VCR from Dolores Poltrone, John Izzi's girlfriend. At the time of the preliminary hearing, Ron Smith refused to testify to these facts, and Detective Euler's report stated that he was told by Smith that Smith had not made those statements to Officer Downward and that "John Izzi had offered him [Smith] $1,000.00 to burn the guy (Simmons)."

This is sufficient evidence to sustain a claim of a civil conspiracy to maliciously prosecute in which defendant Izzi participated since a jury could choose to believe that Izzi arranged for Ron Smith to lie to Officer Downward in order to get the officer to arrest plaintiff. Such evidence, if believed by a jury, is sufficient proof that defendant Izzi conspired with at least one other person in order to injure plaintiff. There is, in addition, circumstantial evidence, such as minor inconsistencies between the deposition testimony of defendants and facts which could be construed as providing motive on the part of Dolores Poltrone to participate in the conspiracy.

Because there is a genuine issue of material fact as to both the underlying claim for malicious prosecution and the existence of a conspiracy, the Court denies defendant Izzi's Motion for Summary Judgment as to Count VII.

9. **Count IX**: Defendant John Izzi's Motion for Summary Judgment is granted with respect to Count IX of plaintiff's Complaint which alleges conspiracy to falsely arrest and falsely imprison. As with any claim of civil conspiracy, the Court must determine whether plaintiff can sustain a cause of action for the underlying claim, in this case, of false arrest or false imprisonment. See, e.g., Samuel v. Clark, 1996 WL 448229, *4 (E.D. Pa. 1996) (citing Pelagatti v. Cohen, 536 A.2d 1337, 1341-42 (Pa. Super. Ct. 1987), appeal denied 548 A.2d 256 (Pa. 1988)

The torts of false arrest and false imprisonment are closely related. In general, "[f]alse arrest and false imprisonment are said to be distinguishable only in terminology. Any difference between them lies in the manner in which they arise." Stuart M. Speiser,

Charles F. Krause & Alfred W. Gans, The American Law of Torts, § 27:2, at 940-41 (1990) [hereinafter American Law of Torts]; see also Goodman v. Frank and Seder of Philadelphia, Inc., 70 Pa. D. & C. 622, 624 (Phil. Ct. Comm. Pl. 1950) ("The action for false imprisonment is closely akin to the action of false arrest.").[5]

"The elements of false imprisonment are (1) the detention of another person, and (2) the unlawfulness of such detention." Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994). An action for false arrest requires, in addition, "that the process used for the arrest was void on its face or that the issuing tribunal was without jurisdiction; it is not sufficient that the charges were unjustified." Strickland v. Univ. of Scranton, 700 A.2d 979, ---, 1997 WL 545903, *3 (Pa.Super. 1997) (citation omitted). Thus, "[a]n arrest based upon probable cause would be justified, regardless of whether the individual arrested was guilty or not. . . . Probable cause exists when 'the facts and circumstances which are within the knowledge of the police officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime.'" Renk, 641 A.2d at 293 (quoting Commonwealth v. Rodriguez, 585 A.2d 988, 990 (Pa. 1991)) (other citation omitted).

In general, a private citizen may be liable for false imprisonment or false arrest "if an officer makes an arrest without a warrant solely at the *request or instigation of [the] private citizen* . . . ." American Law of Torts, § 27:4, at 951(emphasis in original); see also 32 Am.Jur.2d False Imprisonment § 41 (1995). In the case at bar there is considerable evidence that plaintiff's arrest and detention were instigated by the allegedly false statements of defendants Izzi, Poltrone and Smith. However, there was a warrant

[5] For a time, the Pennsylvania legislature did make a distinction, for statute of limitations purposes, between false arrest and false imprisonment. By the Act of July 1, 1935, P.L. 503, false arrest actions were governed by a one year statute of limitations. By the Act of March 27, 1713, 1 Sm.L. 76, Section 1, false imprisonment actions were governed by a two year statute of limitations. This distinction has since been abolished by the legislature and a two year statute of limitations governs both causes of action. See 42 Pa.C.S.A. § 5524(1) (West Supp. 1997).

for plaintiff's arrest, sworn out by Detective Euler who is not alleged to be a participant in the conspiracy. There is no evidence, nor has plaintiff argued, that the issuing tribunal lacked jurisdiction. Thus, the evidence demonstrates that the detention of plaintiff was effected pursuant to proper legal process and it is this proper legal process which determines plaintiff's appropriate cause of action.

While false imprisonment and false arrest are nearly identical, there is a fundamental difference between malicious prosecution and false arrest or false imprisonment:

> The essential difference is the validity of the legal authority for the restraint imposed. In malicious prosecution the detention is malicious but under due form of law, whereas in false imprisonment the converse is true. Thus, where the process on which an arrest is made is regular and legal in form and issued by a court of competent authority, but is sued out maliciously and without probable cause, the remedy is an action for malicious prosecution.
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> But a suit for false arrest or imprisonment is the proper action where the aggrieved party is arrested without legal authority, as for example, where he is arrested pursuant to a process that is void. In the case of malicious prosecution, the valid process justifies the restraint or imprisonment, and the gist of the cause of action is malice or evil intent. In false imprisonment, on the other hand, the essence of the tort consists in depriving the plaintiff of his liberty without lawful justification.

American Law of Torts, § 27:2, at 943-45 (footnotes omitted). These differences are "said to be such that both causes of action [false arrest or false imprisonment and malicious prosecution] cannot exist on the same set of facts." Id., § 27:2, at 945; see also Heck v. Humphrey, 512 U.S. 477, 484 (1994) (noting that malicious prosecution, "unlike the related cause of action for false arrest or imprisonment . . . permits damages for confinement imposed pursuant to legal process" (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 888 (5th ed. 1984)).

Although there is little case law on this point in Pennsylvania, in a 1950 Common Pleas Court case, the court made the distinction addressed above and held that the complaint stated a cause of action for malicious prosecution but not for false imprisonment: "Where the complaint on its face reveals that the imprisonment was

brought about by proper service of a writ, regular in form, and issued by a court having jurisdiction, the liability on the part of the wrongdoer, if any, is for malicious prosecution rather than for false imprisonment." Goodman, 70 Pa. D. & C. at 624. The complaint in that case alleged that "defendant appeared before a justice of the peace . . . and wrongfully and maliciously charged under oath that plaintiff . . . [committed a crime] and thereby caused and procured the justice of the peace to issue a warrant for plaintiff's arrest . . . ." Id. The facts adduced in the instant case demonstrate that plaintiff's detention was the result of a proper, lawful process in which, as in Goodman, a tribunal issued a valid arrest warrant based on allegedly false statements. Plaintiff's claim is, therefore, one for malicious prosecution – a claim asserted in Counts VI and VII which will be allowed to proceed – and not one for false imprisonment or false arrest.[6] Defendant Izzi's Motion for Summary Judgment is therefore granted as to Count IX.

**BY THE COURT:**

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[6] Although this issue has not been recently reached in Pennsylvania, two federal courts in the Eastern District of Pennsylvania have come to conclusions contrary to the one reached by this Court. In Gilbert v. Feld, 788 F.Supp. 854 (E.D. Pa. 1992), Judge Pollack concluded on a motion to dismiss that "[a]lthough it is unclear whether a false arrest/imprisonment claim can lie against one who instigated an arrest or imprisonment through his influence on a third party, allowance of such a claim would seem to be proper under the reasoning of Hess [v. County of Lancaster, 514 A.2d 681 (Pa. Commw. Ct. 1986)]." Id. at 862. Similarly, in Doby v. DeCrescenzo, 1996 WL 510095 (E.D. Pa. 1996), Judge Rendell wrote that:

> a private citizen can be found liable for false arrest or imprisonment if he either knowingly provided false information to authorities or knowingly provided incomplete, misleading information to the authorities which resulted in the detention of another. . . . [The defendant] contends that the warrant was issued with probable cause, and therefore there can be no claim of false arrest. While this would be true if a false arrest charge were leveled against a police officer who acted based on information in a warrant, it will not shield [the defendant] if a jury finds that had he . . . given complete information, the warrant would not have been issued . . . ."

Id. at *13. In both cases, the courts relied on the holding in Hess for their conclusions, but Hess involved a claim for malicious prosecution, not for false imprisonment. It is clear that a private citizen may be liable for instigating criminal action; this Court's research leads it to conclude, however, that where detention was procured through lawful process, there is liability for malicious prosecution, not for false arrest or false imprisonment.

**JAN E. DUBOIS**